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WIRETAPPING IN LAW ENFORCEMENT

THE LEGAL CLOUD that hangs over wiretapping by law enforcement officers, put there by ambiguous interpretations of the federal law on interception of communications, has generated pressure on Congress for new legislation to bring order out of a situation surrounded by doubt and confusion. If the lawmakers accept proposals now being pressed upon them, officials charged with the responsibility of enforcing criminal laws will be given authority to tap telephone wires when investigating serious crimes and to use the evidence thus acquired when prosecuting criminals in court.

The contention that authority of this kind in the hands of the police would deprive the citizens of an important protection afforded by the Communications Act of 1934 has prevented congressional action to revise the wiretapping provisions of that act for more than a quarter of a century. But it has come to be argued that wiretapping is so prevalent—and is so widely practiced by private persons and by the police themselves, notwithstanding the prohibitions of existing law—that a new statute setting forth in precise terms the conditions under which wires could be tapped would afford more actual protection against invasions of privacy than the citizen now enjoys.

While wiretapping is still held by many defenders of civil liberties to be abhorrent in a free society[1]—"dirty business" in the words of Justice Holmes—support appears to be growing for the proposition that the time has come either to arm state and federal law enforcers with unquestioned wiretap authority or to outlaw wiretapping by anyone, absolutely and effectively.

An investigation of wiretapping by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee,

[1] Justice Brandeis wrote in 1928, in an often-quoted dissenting opinion, that "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression compared with wiretapping." President Franklin D. Roosevelt said in 1941: "As an instrument of oppression of free citizens, I can think of none worse than indiscriminate wiretapping."

in progress since 1958, has been speeded up this year with a view to action at the next session of Congress. To date 3,000 printed pages of testimony and documentary material have been amassed. The original focus of the inquiry was on two questions: "How do . . . wiretapping and similar invasions of privacy affect our constitutional rights and are present-day laws sufficient to protect the rights of the individual?"[2] But much of the testimony taken by the subcommittee at its most recent sessions dealt with effects of existing laws and court decisions on police investigations of crime and prosecution of criminals.

The subcommittee held hearings last May on four bills which would grant varying degrees of wiretap authority to federal and other police officials. One of the pending bills (to validate use of wiretap evidence in the courts of states which allow wiretapping under court order) is identical with a measure that was approved by the Judiciary Committee of the previous Congress on June 24, 1960. Support for this measure has mounted in the wake of Supreme Court decisions which have left doubt as to the validity of wiretap evidence in the courts of states which permit wiretapping by law enforcement officers. The bill was offered originally as an emergency measure, urgently needed by police authorities and state prosecutors to remove restraints imposed by the courts.

Uncertain Legality of Wiretapping by Police

The present position of the federal government on wiretapping is derived from the wording of Section 605 of the Communications Act of 1934 as it has been interpreted by the federal courts. Section 605 reads: "No person not being authorized by the sender shall intercept any communication *and* [emphasis added] divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person." The Communications Act was adopted six years after the U.S. Supreme Court had ruled, 5-4, in 1928 that constitutional restraints on search and seizure did not apply to wiretapping.[3]

After 1934, court rulings in wiretap cases interpreted federal policy as determined by Section 605 of the Communications Act, but the decisions of the courts added to rather

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[2] Statement by Sen. Sam J. Ervin, Jr. (D N.C.), chairman of Senate Subcommittee on Constitutional Rights.

[3] Olmstead v. United States, 277 U.S. 438 (1928).

than dispelled the ambiguity of the statute as it applies to wiretapping in states which sanction this method of crime detection.

The Justice Department has consistently maintained that the authors of the Communications Act did not intend to prevent wiretapping by the department's agents. After the Supreme Court ruled in 1937 that evidence obtained by wiretapping could not be used in federal courts,[4] the department took the position that the law did not forbid its agents to tap telephones even though the evidence so gained could not be offered in prosecutions. This interpretation was based on the reasoning that while intercepting and divulging was forbidden, intercepting without divulging was allowed. The department further contended that divulging wiretap information within the department was not divulgence within the meaning of the Communications Act. The Supreme Court has not ruled on this question.

The legal case for police wiretapping in the states rests on equally tenuous reasoning. Diverse state laws and numerous court opinions have resulted in a patchwork of official opinions on what is and what is not permissible. A recent congressional survey showed that six states (Louisiana, Maryland, Massachusetts, Nevada, New York, Oregon) authorize wiretapping by the police; 33 states impose total bans on the practice; 11 states have no definitive statutes on wiretapping. But approximately half of the states admit evidence obtained by the police in contravention of state and federal law. In four states, evidence illegally obtained may be admitted under certain circumstances.[5]

Court Limitations on Enforcement Activities

Early court findings on the meaning of Section 605 of the Communications Act restrained the use of wiretap evidence by federal officers but had little effect on state or local

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[4] Nardone v. United States, 302 U.S. 379 (1937). Two years later, the Court banned use in federal courts of evidence developed from leads obtained by wiretapping. Nardone v. United States, 308 U.S. 338 (1939). In the same year the Court extended the federal prohibition to intrastate as well as interstate telephone calls. Weiss v. United States, 308 U.S. 321.

On the other hand, the Supreme Court admitted the testimony of informers who had been induced to testify against the defendant when confronted with F.B.I. recordings of their conversations. Goldstein v. United States, 316 U.S. 114 (1942). And it has ruled that it is not illegal for police to listen in on a telephone conversation if the consent of one party has been obtained. Rathbun v. United States, 355 U.S. 107 (1957).

[5] Senate Judiciary Subcommittee on Constitutional Rights, *State Statutes on Wiretapping* (1961), pp. 103-104. Illegally obtained evidence is not admissible in federal courts.

law enforcement activities. The first application of the federal law to police operations in the states came in 1952 when the Supreme Court ruled on an appeal from a conviction in a state court which could not have been obtained without wiretap evidence. The Court upheld the conviction but noted that the evidence was illegally obtained under the federal statute. It said that Congress had power to regulate the admission of wiretap evidence in state courts but had not done so in the Communications Act.[6]

Five years later, in the important Benanti case, the Supreme Court took a sterner stand against what it construed to be a violation of the Communications Act by state officers. It reversed a conviction in a federal court because the prosecutor had offered testimony by New York investigators who had tapped telephones with the authority of a court order, as provided under state law. "Had Congress intended to allow states to make exceptions to Section 605 it would have said so. . . . We find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy." [7]

The status of wiretapping by state law enforcement officers, seemingly clarified by the Benanti decision, was thrown into doubt again by a decision rendered last February by the Supreme Court. In that case a defendant had sought a federal injunction, before he came to trial in a New York court, to prevent introduction of wiretap evidence in the hands of state prosecutors. In a one-sentence opinion, the Supreme Court ruled, 7-2, that the federal courts could not issue injunctions against use of wiretap evidence in state trials.[8] While this seemed to allow introduction of the wiretap evidence, it left open the question whether the prosecutors would subject themselves to federal penalties if they introduced such evidence.

The possibility of prosecution had been noted by one of the judges of the U.S. Court of Appeals, which had decided the above case adversely to the petitioner in April 1960. The lower court denied the requested injunction on the ground that a federal court should not "interfere with the prosecution of a state criminal procedure in order to provide an additional means of vindicating any private

[6] Schwartz *v.* Texas, 344 U.S. 199 (1952).
[7] Benanti *v.* United States, 355 U.S. 96 (1957).
[8] Pugach *v.* Dollinger, 365 U.S. 458 (1961).

rights created by [Section] 605 [of the Communications Act.]" One member of the court wrote in a concurring opinion that he had voted with the majority because he did not believe any New York state trial judge would permit introduction of wiretap evidence in his court. He considered it "presumptuous to assume that any New York state trial judge will acquiesce to the commission of a crime against the United States in his presence . . . by a witness testifying under oath." The local U.S. attorney was admonished to follow the case closely, because it would be "a most extraordinary offense to this court" if wiretap evidence were introduced and there was a failure to prosecute.

A few days later a Nassau County (N.Y.) judge barred wiretap evidence, basing his rule on the earlier Benanti decision of the Supreme Court and on the Appeals Court's decision on the injunction question. He said the latter case clearly indicated that the Appeals Court was "unequivocal in its opinion that the introduction of wiretap evidence would constitute a violation of a federal criminal statute." Therefore he would not permit such an "extraordinary affront to the federal court." Other judges in New York have refused to grant police applications for wiretapping authority on the ground that the Benanti decision stands in the way.

Pleas to Lift Restraints on Crime Prosecution

Recent court decisions on wiretapping have greatly hindered preparation of criminal prosecutions in states in which use of wiretap evidence had long been accustomed procedure. This has been particularly true in New York, whose officials have taken the lead in pressing Congress for emergency legislation to wipe out effects of the Benanti rule.

At a public hearing on wiretapping by the State Investigation Commission in April 1960, New York County District Attorney Frank S. Hogan testified that he had been forced to hold up six major investigations and prosecutions on 10 indictments in which wiretap evidence was an important element. Kings County (N.Y.) District Attorney Edward S. Silver told the commission that he might have to dismiss 200 defendants; he predicted a "gigantic legal jail break" all over the country as a result of the new federal restraints on wiretapping by the police.

New York attorneys carried their pleas to the Senate Subcommittee on Constitutional Rights this year. Hogan told the subcommittee, May 13, that "Under present conditions, law enforcement in New York is virtually crippled in the area of organized crime." He said he was stumped on what action to take in a major narcotics case involving four "kingpins" doing a multimillion dollar annual business in heroin. Queens County District Attorney Frank O'Connor said the situation had become "intolerable."

> We have many, many prosecutions that are pending right now on which we have devoted not only days, but weeks and months . . . [even] years of investigation . . . where we have received valid indictments. Those indictments have been sustained against attack on motions to dismiss and now, because of the wiretap situation, we are uncertain as to the legality of the prosecution. . . . We are at the point now where we will accept any legislation that is passed [by Congress] that will relieve the situation.

The New York Joint Legislative Committee on Privacy of Communications, which has been investigating problems in eavesdropping for the past half-dozen years, has issued several reports since the 1957 decision in the Benanti case, asking Congress to soften the impact of the Supreme Court's finding. In a report issued in early 1961, the committee said: "We do not consider it necessary at this time to detail again our strong criticism of the vague inadequacy of the 31-word clause in the Federal Communications Act, which is the sole basis for the federal court decisions, but we do reiterate our plea to Congress for definitive action."

Sen. Kenneth B. Keating (R N.Y.) summed up the situation for the Senate Subcommittee on Constitutional Rights, May 9, as follows:

> Under the present law, a New York trial judge commits no error in admitting wiretap evidence in a criminal trial. But in allowing such evidence to be admitted, he is tolerating, if not aiding, the commission of a federal offense. The state district or prosecuting attorneys who are sworn to uphold the law, actually are in jeopardy of federal prosecution even though they fully comply with required state procedures.

Keating said he had no doubt that "Effective law enforcement has been stymied . . . and that only Congress can remedy this situation."

Prof. Charles A. Reich of Yale University, speaking for opponents of all wiretapping, told the subcommittee: "Of

course they [law enforcement officials] are in a dilemma and want a way out. But the way out is to tell them once and for all not to do these things."

Extent of Wiretapping, Public and Private

DESPITE THE BAN on interception of communications under federal law and the laws of 33 states, a considerable amount of telephone tapping is believed to take place. "Each day in every major city of the nation, private telephone conversations are being listened to and recorded by unknown and unsuspected persons," Sen. Thomas J. Dodd (D Conn.) said on the floor of the Senate last March 30.

> The full extent of telephone wiretapping cannot be known. . . . But we do know from fragmentary evidence that this practice is shockingly widespread and that it is growing from year to year. . . . Virtually no one . . . is safe from having his most private telephone conversations overheard and recorded on tape. If someone seriously wants to tap your phone, the overwhelming probability is that he can do it and get away with it.

The hidden ear may belong to a private detective seeking evidence for a divorce action, a company agent wanting to learn the business secrets of a competitor, a politician in search of campaign ammunition, a racketeer gathering information for purposes of blackmail, an executive keeping tabs on employees, a secretary making a routine record of office calls, or a police officer hunting leads in a criminal investigation.

Rarity of Prosecutions for Illicit Interception

Despite the assumed prevalence of wiretapping, prosecutions for interception of communications are infrequent. Law enforcement officials explain that it is difficult to detect the existence of a tap in the first place and difficult to get evidence that will convict the offender.

Kings County District Attorney Silver told the Senate Constitutional Rights subcommittee: "When a burglary . . . or a homicide is committed, even if the perpetrator is not found, you know that a crime was committed. . . . But if somebody taps a wire illegally, he pulls off his equipment. There is no evidence left to show that there has been such a crime. . . . We very rarely get the information that such a crime was committed." He said telephone companies

should be compelled to report the taps they discover, although they may prefer to do otherwise "because they don't want to give the impression that perhaps the telephone isn't quite as private as it might be."

Chairman Anthony P. Savarese, Jr., of the New York Joint Legislative Committee on Privacy of Communications told the Senate subcommittee, May 12, that his group had not been able to develop statistics on the extent of illegal tapping, whether by police or others, because wiretapping was all but impossible to detect. "In the first place . . . all you need is a set of headphones, two wires and a couple of clips. And all it takes is the ability to scrape the . . . insulation off the telephone wire, attach the clips to it and you can tap wires." Components of a wiretap set, Savarese said, could be bought at a hardware store for $2 or less.

The federal Justice Department never prosecutes police officers for wiretapping because it holds that tapping for purposes of law enforcement is not illegal. Nor does it prosecute for disclosure of wiretap evidence in court because federal policy is not to interfere with non-federal prosecutions. Assistant Attorney General Herbert J. Miller, Jr., told the Senate subcommittee: "We don't think it would be proper to prosecute a man for doing his job under a state statute . . . [and if we did] I don't think we would have much chance of a conviction."

But even prosecutions of private tappers of telephone wires are rare. Miller said last May that there had been only 14 federal prosecutions for wiretapping since 1952. Currently there are four or five under way. In all such cases, convictions are hard to win. James R. Hoffa, then vice president of the International Teamsters Union, was tried in 1957 and again in 1958 on charges of conspiring to tap the telephones of the union's Detroit headquarters, but he was finally acquitted.

Wiretapping has been a penal offense in California for more than 50 years, but, according to a recent study, there have been only two or three prosecutions and only one conviction over the past two decades.[9] Charges of wiretapping were brought against the mayor of Portland, Ore., in 1957, following an exposé of alleged tie-ins between local

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[9] Sam Dash, *The Eavesdroppers* (1959), p. 208.

officials and gambling operators, but the charges were later dismissed.

Private detectives are believed to be the chief offenders. Laws and court rulings which sanction wiretapping if permission has been given by the telephone subscriber, or by one party to a conversation, keep some of this practice by private operators within the law. A related form of communication interception, which has become fairly common in business offices, is third-person monitoring of telephone conversations. This practice is often adopted to enable secretaries to keep full records of telephone calls.

The House Government Operations Committee professed outrage when it discovered last summer that telephone monitoring had long been practiced in executive agencies of the federal government. After checking with most of the agencies in Washington, the committee reported on Sept. 19 that 33 of them permitted telephone monitoring, 21 had no regulations controlling the practice and 17 did not always require notification of the other party to a call that monitoring was in progress. The committee report warned:

> Big Brother may not be watching you yet, but his secretary probably is listening in on your telephone calls to government agencies. This telephone eavesdropping should be banned and all types of listening-in should be tightly controlled by clear regulations which, at the very minimum, require government officials to warn callers of telephone monitoring.

After the committee filed its report, a number of government agencies called a halt to the practice of telephone monitoring.

Authorized and Unauthorized Wiretapping by Police

With no way of determining the actual amount of wiretapping that goes on, controversy has developed between law enforcement officials and the opponents of any form of wiretapping over the extent to which the police rely on wiretapping in criminal investigations. Official records in jurisdictions where police tapping is permitted show a relatively small number of authorized taps; police officials in jurisdictions where all wiretapping is forbidden generally assert that they give strict obedience to the law. But according to some investigators, official testimony understates by far the actual amount of wiretapping by law enforcement officers.

The Federal Bureau of Investigation reported that on a random day last spring it had 80 wiretaps in operation, which it said was a typical number. F.B.I. Director J. Edgar Hoover had told the House Appropriations Committee on Feb. 5, 1959, that his agency used taps only for cases of internal security or when a life was endangered, as in kidnaping cases. At the time he testified, he said there were 74 F.B.I. taps in active status.

The New York City police commissioner told a state investigating commission last year that his department obtained an average of fewer than 300 court orders a year for wiretapping in all five counties of the metropolis. According to District Attorney Frank S. Hogan of New York County, police and district attorney orders together average only one tap for every 60,000 telephones in the area. Hogan told the Senate Constitutional Rights subcommittee, May 12, that over a 10-year period, during which his office had handled 344,000 criminal matters, it had received only 727 court authorizations for wiretapping.

According to a nation-wide study sponsored by the Pennsylvania Bar Association Endowment and financed by the Fund for the Republic, members of police departments engage in wiretapping on an extensive scale even in states where the practice is forbidden by law. And in states which grant a limited privilege, the police are said to carry on a substantial amount of tapping beyond the range of their authority. Sam Dash, author of *The Eavesdroppers*, in which the findings of this investigation were reported, told the Senate subcommittee on July 9, 1959, that "In any case in which the police . . . believe that they should wiretap, despite the prohibition, they wiretap."

Testifying again last May, Dash said that in states which require a court authorization for wiretapping, "Police officers have shown complete impatience with the court-order system and more often have engaged in wiretapping without a court order than with a court order." He said that even duty-minded officers tended to disregard the court-order requirement because they felt that delay in obtaining a court order would hamper pursuit of a criminal.

The rule in many jurisdictions against use of wiretap evidence in court did not necessarily deter police wiretapping, Dash testified, because the primary purpose of wiretapping is to get leads for investigations rather than to

develop evidence for prosecution. He charged that the police department in one large city evaded a statutory ban by engaging a private wiretapper to do the work, giving the tapper in return immunity from arrest for carrying on an illegal business.[10]

Alan F. Westin, a Columbia University professor of government who has been following wiretap developments since 1950, told the Senate subcommittee that he believed "a new climate" had developed in police wiretapping since the Pennsylvania Bar Association Endowment's investigation.

> I think the situation has changed a good bit. . . . The public in the court-order as well as the total-ban states is rapidly becoming aware and sophisticated on the question of disregard of the new eavesdropping laws.
>
> Legislative committees and grand jury investigations, city council hearings . . . congressional inquiries, "snoopy bar associations" and civil liberty organizations . . . are at work to keep the court-order provisions and the total-ban provisions constantly to the forefront of public attention.

Since 1953, Westin said, at least 10 states have enacted new wiretap legislation; in the past three years, 18 legislatures have considered eavesdropping control bills of various kinds.

Status of Wiretapping Under Court Authorization

State wiretapping laws for the most part forbid interception of communications, but the statutes of six states make exceptions for law enforcement officers. Louisiana is the only one of the six which places no statutory restrictions on police exercise of wiretapping authority. The Louisiana law specifically prohibits telephone and telegraph wiretapping but provides that it "shall not be construed to prevent officers of the law, while in the actual discharge of their duties, from tapping in on wires or cables for the purpose of obtaining information to detect crime."

New York was the first state to enact a prohibitive law which at the same time set up a court-order system to allow tapping by law enforcement officers. The New York law is based on the guarantee incorporated in the state constitution in 1938 of "the right of the people to be secure against *unreasonable* [emphasis added] interception of telephone and telegraph communications." Under the law an illegal wiretapper is anyone, other than sender or receiver,

[10] *Ibid.*, p. 164.

"who willfully and by means of instrument overhears or records . . . [the] communication, or . . . permits another to do so, without the consent of either a sender or receiver." Violation is a felony; maximum punishment is two years in prison.

However, a district attorney or police officer above the rank of sergeant may apply to a judge of a general sessions, county or higher court for an order authorizing a wiretap. The applicant must show that there is "reasonable ground to believe that evidence of a crime may be thus obtained," and he must give the number of the telephone to be tapped and describe the individuals whose communications are to be intercepted. A 1957 amendment reduced the maximum period of authorization from six months to two months.

Oregon in 1955 adopted a law forbidding interception unless consent is given by at least one party to the communication. Only a district attorney may apply to a circuit or district court judge for an order authorizing a wiretap. The applicant must show that there are reasonable grounds to believe (1) that a crime directly and immediately affecting the safety of human life or the national security has been committed or is about to be committed; (2) that the evidence obtained will be essential to the prevention or solution of the crime; (3) that "there are no other means readily available for obtaining such information." Orders are effective for a maximum of 60 days and an officer who continues to tap wires after expiration of the order is subject to penalties of up to a $3,000 fine and imprisonment for three years.

Maryland in 1956 enacted a law forbidding interception "except by court order in unusual circumstances to protect the people." The law states that it is "the public policy of this state that detection of the guilty does not justify investigative methods which infringe upon the liberties of the innocent." A state's attorney or police officer may apply for a court order under conditions similar to those prescribed in the Oregon act, except that the nature of the crime to be investigated is not specified. The law requires the court to examine the officer-applicant under oath and the orders are effective for only 30 days.

The Nevada law, in force since 1957, prohibits interception unless authorized by both sender and receiver. Court orders may be issued to the attorney general or a district

attorney if "there are reasonable grounds to believe that the crime of murder, kidnaping, extortion, bribery or crime endangering the national defense or a violation of the uniform narcotic act has been committed or is about to be committed." The orders may authorize tapping up to 60 days, renewals for 30 days. Massachusetts in 1959 adopted a law similar to the New York statute, except that orders may be issued only to the attorney general or a district attorney. They are effective for three months.

Many states have laws of long standing which forbid interference or tampering with communication lines. Several states have in recent years adopted more specific prohibitory laws. Illinois in 1957 enacted a law broadly forbidding all forms of eavesdropping by use of electronic devices.[11] Pennsylvania in the same year forbade interception of telephone or telegraph communications without the permission of both parties and specified that the ban shall apply to anyone "acting or purporting to act for or in behalf of any government . . . whether federal, state or local." The Illinois and Pennsylvania statutes both prohibit the use of wiretap evidence in prosecutions.

Proposed Shifts of Policy on Wiretapping

LEADING CRITICISMS of the existing federal law on interception of communications have been that (1) it has failed to protect the citizen against repeated and unpredictable violations of privacy; (2) it has deprived the federal government of an effective weapon against subversion and organized crime. Since the Supreme Court's 1957 decision in the important Benanti case, it has been argued also that the law, as interpreted by the courts, is robbing the states of their constitutionally guaranteed police powers.[12] Some authorities see a connection between the relative freedom of private wiretappers to operate illicitly and the wiretapping proclivities of the police; they say the police prefer not to bring charges of violating a statute of which they themselves are frequent violators.

[11] See "Eavesdropping Controls," *E.R.R.*, 1956 Vol. I, pp. 68-70.

[12] It may be noted, however, that the Supreme Court observed as long ago as 1952, in the Schwartz case, that Congress has power to control the admission of wiretap evidence in state as well as federal courts but had failed to exercise that power.

LEGAL AMBIGUITY AS FACTOR IN LAX ENFORCEMENT

The question has frequently been raised whether "hair-splitting decisions of the courts" have correctly interpreted the actual intent of Congress when the Communications Act was passed 27 years ago. Chairman Savarese of the New York Joint Legislative Committee on Privacy of Communications has often complained that failure of the Congress to clarify the act has allowed the judiciary to exercise what amount to legislative functions. He has directed attention to the fact that, as of 1960, the U.S. Code carried 24 fine-print columns of summaries of decisions interpreting the "31 pertinent but cryptic words" in Section 605 of the 20,000-word Communications Act.

> They [the 31 words] were never debated by the Congress or mentioned in its committee reports. . . . They have, however, been endlessly debated in the courts; and on these words alone . . . the Supreme Court has erected a vast superstructure of case law explaining the intent of Congress. . . . [But Congress] alone has the real key to the mystery of congressional intent.[13]

Savarese maintained that if Congress had realized in 1934 that the measure would be interpreted to curb the police powers of the states, there would have been "strenuous debate" on the question.

Prof. Robinson O. Everett of Duke University told the Senate Subcommittee on Constitutional Rights last May that he thought the present law reflected "much less the actual intent of Congress than the imputed intent." He said there would be a "much happier situation insofar as obedience to the law is concerned" if Congress would enact a new law which made its meaning clear beyond doubt. "Until the present ambiguity of Section 605 . . . is replaced by a clearer expression of the congressional mandate, I believe the situation will continue to be unsatisfactory, with a federal law (. . . as interpreted by the Supreme Court) being honored in the breach and by the very persons charged with enforcement of the law." Alan F. Westin, Columbia professor, told the subcommittee that the worst effect of the present "intolerable situation" was that law enforcement was put in a dishonorable position.

> I don't think it does credit to our attorneys general and our law enforcement officials to take the interpretation they have of Section 605. . . . Nor do I respect the way the Department of

[13] Anthony P. Savarese, Jr., "Eavesdropping and the Law," *American Bar Association Journal*, March 1960, p. 263.

> Justice has to explain why it doesn't prosecute state law enforcement officials. . . . It nurtures a terrible sense of guilt and dishonesty on the part of federal law enforcement officials which harms the reputation of all law enforcement officials and makes them do . . . things which they don't want to do as honorable men.

While there is general agreement that the present law would profit from revision, there is no consensus on what form revision should take—whether wiretapping for law enforcement purposes should be authorized and wiretap evidence be made admissible in court, or whether wiretapping should be banned totally and unequivocally.

Debate on Needs of Police vs. Right of Privacy

The debate over police wiretapping is of long standing and the arguments pro and con have changed very little over the years. Law enforcement officers base their plea for wiretapping authority on their need of this weapon for protection of the public against criminals, especially those engaging in organized crime and subversion. The National District Attorneys Association has repeatedly petitioned Congress to free state law enforcement authorities from restrictions imposed by court interpretations of the federal law.[14] The Justice Department at Washington has sought for two decades to win statutory backing for wiretapping activities of the F.B.I. and authority to introduce wiretap evidence in federal courts.

Persons who oppose wiretapping under any circumstances say its claimed advantages in law enforcement are exaggerated [15] or are not so great as to justify violation of the rights of citizens and dependence on "police state methods." Despite the Supreme Court's finding in 1928, prior to adoption of the present Communications Act, that interception of communications does not violate constitutional rights, some legal authorities still hold a contrary opinion. They cite judicial decisions which have applied search-and-seizure rules to admission of wiretap evidence in court and believe that in a new case the present Supreme Court might reverse the 1928 decision.

Lawyers who make a practice of criminal defense tend

[14] However, Attorney General Earl E. Harley of New Mexico wrote Chairman Ervin of the Senate Subcommittee on Constitutional Rights, April 18, 1961, that he hoped Congress would not authorize or condone wiretapping by law enforcers because this was "suitable in a police state" but "neither necessary nor desirable in the United States."

[15] Sen. Wayne Morse (D Ore.) told the Senate, May 15: "Wiretapping is the tool of the lazy . . . of the inefficient in law enforcement."

to oppose authorization of wiretapping by the police. Among legal scholars who find police wiretapping obnoxious, however, there appears to be a trend toward reluctant acceptance of tightly controlled wiretapping for serious crimes.

A report on pending federal legislation, issued last Jan. 10 by a committee of the Bar Association of the City of New York, stated that "Even those members of the committee philosophically opposed to all wiretapping were induced by essentially pragmatic considerations to join in the committee's conclusion that the national policy should shift from absolute prohibition of wiretapping to 'controlled' wiretapping."

> It is clear from a number of authoritative studies [said the report] that, in the face of the present national policy, wiretapping by law enforcement officials and others is so widespread and entrenched a practice throughout the nation that it would be illusory to believe any complete prohibition could be made effective. . . . These studies, moreover, indicate that the trend of both public and expert opinion is now in the direction of "controlled" wiretapping by law enforcement officials, under continuous and close supervision.

The committee cautioned, however, that a shift of national policy in this direction would have far-reaching repercussions. The 33 states which now prohibit wiretapping would be pressed to follow the federal example and permit it. And if Congress passed a measure that did no more than free the states to authorize wiretapping by law enforcement officers, it would "inevitably and forcefully be urged that there is no logical justification to deny wiretapping authorization to federal agencies alone."

Bills in Congress to Permit Limited Wiretapping

Should Congress come to the conclusion that wiretapping for purposes of law enforcement ought to be authorized, prolonged debate over terms of the authorization can be expected. Important questions to be decided would be: For the investigation of what kind of crimes should tapping be allowed? On whose authority should permission for wiretapping in each case be granted? Should Congress set the limits for police wiretapping in the states or should the states be allowed to fix their own limitations?

The four bills now pending before the Senate Judiciary Committee vary somewhat in the ways they would answer

these questions. Sen. Kenneth B. Keating (R N.Y.) has sponsored two bills, one an emergency measure to permit state officers to tap wires in states which provide for a court-order system, the other a more comprehensive bill which would outlaw all eavesdropping by acoustical devices with the exception that law enforcement officers—federal and state—could be granted court authorization to intercept communications. A bill introduced by Sen. Roman L. Hruska (R Neb.) would exclude from any federal restriction on wiretapping those state officers who operate under a court-order system requiring a showing that the officers have cause to believe that a crime has been or is about to be committed and that the telephone or telegraph is being used or will be used in commission of the crime.

A bill offered by Sen. Thomas J. Dodd (D Conn.) would permit the Attorney General of the United States, without court order, to authorize federal agents to tap wires in cases involving espionage, treason, sabotage, sedition and kidnaping, but would require court permission for federal wiretapping in cases involving murder, extortion, bribery, gambling, racketeering and narcotics law violations. In addition, the Dodd bill would establish the legality of court-order wiretapping by state officers, when authorized by state law, in cases involving the above crimes. All applications for permission to tap wires would have to show reason to believe the crime had been or was about to be committed, also that the tap would provide evidence needed to prevent the crime or convict the offender, and that no other means of obtaining this evidence was available. All four pending bills specify that evidence obtained under the indicated conditions would be admissible in court.

The Justice Department has put in a strong plea that any new legislation permit the Attorney General to authorize wiretapping, without obtaining a court order, in cases involving a threat to the national government. Assistant Attorney General Herbert J. Miller, Jr., told the Senate Subcommittee on Constitutional Rights last May 11 that "The need for speed, secrecy and centralized control is too great to permit reliance upon application to the federal courts." Not only was it possible that delay in obtaining a court order might be "fatal in a national security investigation," but the mere filing of an application would increase "the risk that rumors will spread."

Miller further urged that the law not specify the crimes for which wiretap investigations by state police were to be allowed. "Because of the varying state statutes, the problems of definition, and the delicate relationship between the federal and state governments," he said, it was believed that there would be "substantial enforcement problems" if state officials could make wiretaps only for the investigation of certain enumerated crimes. Miller thought it better to leave this question to the states.

New York County District Attorney Frank S. Hogan told the subcommittee that "The importance of an investigation depends neither on the grade of crime nor its name . . . [but] on the size and nature of the criminal operation under surveillance." Wiretapping for what are considered minor crimes, like gambling and prostitution, is important, he said, because of possible links to organized crime of a more serious nature, such as trafficking in narcotics, racketeering, and engaging in murder for hire.